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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET,

Respondents.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion and order of the District Court (Cooper, U.S.D.J.) (A. 79) are reported at 315 F. Supp. 357. The decision of the Court of Appeals for the Second Circuit affirming the order of the District Court (A. 94) is reported at 442 F.2d 694.

Jurisdiction

The decision of the Court of Appeals affirming the order of the District Court was filed and entered on April 23, 1971. A Petition for Certiorari was filed with this Court on July 22, 1971. Certiorari was granted on October 26, 1971. The jurisdiction of this Court is conferred under 28 U.S.C. §1254(1).

Statutes Involved

New Jersey Joint Tortfeasors Contribution Law, §3 (N.J. Rev. Stat. 2A:53A-3) which provides:

> "Judgment against joint tortfeasor; contribution. Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought." L.1952, c.335, p. 1075, §3.

The Longshoremen's and Harbor Workers' Compensation Act, §5 (33 U.S.C. §905) which provides:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not

plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. March 4, 1927, c.509, §5, 44 Stat. 1426."

Questions Presented

1. Should this Court recognize a right to contribution under maritime common law in non-collision cases?

2. Is contribution precluded by the Longshoremen's and Harbor Workers' Act?

3. Should the court of appeals have applied a New Jersey statute creating a right of contribution?

Statement of the Case

Jurisdiction in the district court rested on diversity of citizenship of the parties.

The action was commenced on May 5, 1966 by Benazet, a resident of New Jersey, against Atlantic, for injuries sustained by him on July 30, 1964 when he fell while working on a box car owned by Atlantic, but in the custody of Erie. Benazet was employed by Erie as a yard brakeman. The box car was on Erie's car float, floating on the Hudson River. Benazet fell in the process of tightening the handbrake because both the footboard on which he was standing and the brake-wheel supports broke. The evidence showed that the footboard was decayed and that the brake-wheel supports had been damaged and improperly repaired somewhere in the course of the car's passage

through many railroad systems. The evidence further showed that the defects should have been readily apparent and that the damage to the footboard in particular was easily observable from the ground (A. 34-37). Erie failed to discover the defects although it had a duty to inspect the car on receipt in interchange from a connecting line.

Atlantic impleaded Erie on the ground that Erie was negligent and liable to Atlantic for contribution or indemnity. Erie answered and participated as a third party defendant in the trial.

The jury found that Atlantic was negligent. It also found that Erie was negligent and that Erie's negligence was a substantial factor in bringing about Benazet's injuries. The jury awarded a verdict of $200,000 to Benazet (A. 61-62).

Erie moved for a post-trial order dismissing Atlantic's third party complaint as a matter of law on the ground that no right of contribution existed under maritime law or through supplementation of maritime law with state law.

The opinion and order of Cooper, J. filed July 2, 1970 (315 F. Supp. 357) dismissed Atlantic's third party claim against Erie for contribution as a matter of law (A. 79). This order was affirmed by the Second Circuit Court of Appeals (Smith and Moore, C.J.J. and Timbers, D.J.) in an order and judgment filed April 23, 1971 (A. 94).

Summary of Argument

Deciding now the questions deferred in *Halcyon* v. *Haenn*, this Court should recognize that two parties jointly liable in tort for the injuries to an employee covered by the Longshoremen's and Harbor Workers' Act should both contribute to the judgment in his favor, and that the Act is not a bar to such contribution. *Halcyon's* invitation to congressional action has not been accepted, although two decades have passed. Cases decided in the meantime have held either party liable under theories of contract, despite the Harbor Workers' Act, and have required equal contribution in tort cases where the Harbor Workers' Act was not present. No reason persists, or is required to make the Harbor Workers' Act effective, to justify the unfair result of one party bearing sole responsibility for damages created by both.

Alternatively, a right of contribution provided by a New Jersey statute should be applied to this accident in New Jersey waters.

ARGUMENT

1. *Court of Appeals' application of* Halcyon

The Court of Appeals stated that "Atlantic's contribution claim, so far as the equities are concerned, is appealing" (A. 98). But it felt precluded from awarding contribution by this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); it quoted Judge Friendly's admonishment[1] that—

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . . ."

The *Halcyon* case presented questions of the existence and extent[2] of a duty of contribution among joint tortfeasors whose negligence had injured a harbor worker employed by one of them to repair a ship owned by the other. Although lower courts had awarded contribution in admiralty cases[3] as this Court had recognized,[4] and although contribution had been found proper by Mr. Justice

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[1] In *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 395 U.S. 946 (1969).

[2] Whether the employer should contribute 75% (its proportion of fault as found by the jury), or 50% (the "general rule governing maritime torts"), or no more than its employee could have obtained from it by compensation under the Longshoremen's and Harbor Workers' Compensation Act, or nothing (342 U.S. at 283-4; fn. 12 at 286-7).

[3] See *e.g.*, *The S.S. Samovar*, 72 F. Supp. 574 (N.D. Calif. 1947); *The Tampico*, 45 F. Supp. 174 (W.D. N.Y. 1942); and *New York & Porto Rico S.S. Co.* v. *Lee's Lighters, Inc.*, 48 F.2d 372 (E.D. N.Y. 1930).

[4] In *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947) (dictum).

Holmes thirty years before,[5] the *Halcyon* Court stated that the maritime doctrine of equal contribution had never been expressly applied by the Supreme Court to non-collision cases (342 U.S. at 284). The Court stated that it "would feel free to do so here if wholly convinced that it would best serve the ends of justice" but concluded it was wiser to let the rules of contribution await congressional action. Congress had enacted the Limited Liability Act,[6] the Harter Act,[7] the Jones Act,[8] the Public Vessels Act,[9] and the Longshoremen's and Harbor Workers' Compensation Act;[10] its processes were peculiarly adapted to determine whether any right of contribution should be limited by the Harbor Workers' Act, or based on equal sharing of damages, or apportioned according to fault; and because Congress while acting in the field had not approved "the rule of contribution here urged" it was inappropriate for the Court to do so (342 U.S. at 285-7).

In the two decades since the *Halcyon* decision, Congress has not acted. To the extent *Halcyon's ratio decidendi* was based on anticipated legislative clarification, that reason has failed. The concern whether the sole exposure to liability of a harbor worker's employer should be the Harbor Workers' Act has been substantially eliminated by: a

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[5] *White Oak Transp. Co.* v. *Boston, Cape Cod and New York Canal Co.*, 258 U.S. 341 (1922) (not involving Longshoremen's and Harbor Workers' Compensation Act).

[6] R.S. §4281, *as amended*, 46 U.S.C. §181 *et seq.*

[7] 27 Stat. 445, 46 U.S.C. §§190-195.

[8] 41 Stat. 1007, 46 U.S.C. §688.

[9] 43 Stat. 1112, 46 U.S.C. §§781-790.

[10] 44 Stat. 1424, 33 U.S.C. §901 *et seq.*

series of cases following *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*,[11] imposing obligations based upon contractual concepts; this Court's decision in *Jackson* v. *Lykes Bros. S.S. Co.*[12] that longshoremen can (notwithstanding the Harbor Workers' Act) sue their employer for unseaworthiness if he is also the shipowner; this Court's adverse construction in *Weyerhaeuser S.S. Co.* v. *U. S.*[13] of similar protective words in the Federal Employees' Compensation Act;[14] this Court's observation in *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.*[15] that there is no *quid pro quo* blocking liability to third persons; and advances in the direction of fairer rights to contribution and the equal sharing of damages, made by other federal courts. During the same period the *Halcyon* decision has come under steady criticism by both courts[16] and commentators.[17]

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[11] 350 U.S. 124 (1956).

[12] 386 U.S. 731 (1967).

[13] 372 U.S. 597 (1963).

[14] 63 Stat. 861 (1949), *as amended*, 5 U.S.C. §8116(c) (1966).

[15] 394 U.S. 404 (1968).

[16] See, *e.g.*, *Bilkay Holding Corp.* v. *Consol. Iron & Metal Co.*, 66 Ad. 344 (S.D.N.Y., filed Aug. 17, 1971), which refers to the instant case as "the most recent expression of post-*Halcyon* consternation in this Second Circuit."

[17] See Gilmore & Black, *The Law of Admiralty* 367 (1957); Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 519 (tentative ed. 1958); Albritton, Division of Damages in Admiralty—A Rising Tide of Confusion, 2 J. Mar. L. & Com. 323 (1971); Proudfoot, "The Tar Baby": Maritime Personal Injury Indemnity Actions, 20 Stan. L. Rev. 423, 425-26 and 445 (1968); Currie, Federalism and the Admiralty, "The Devil's Own Mess", The Supreme Court Rev. 158, 212-13 and 220-21 (1960); Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Rev. 381 at 421-22 and 424 (1954).

Generally understood as prohibiting contribution except where it is clear the employer is not by statute immune from tort liability, *Halcyon* works manifest injustice.

In the present case although the jury found that Erie's negligence was a substantial factor in bringing about Benazet's injuries, the court of appeals' opinion denies Atlantic any contribution from Erie towards the $200,000 judgment. Erie will recoup—from the judgment paid to Benazet by Atlantic—its compensation payments, and will end by paying nothing. Although negligent and responsible, Erie thus pays even less than it would have been required to do if plaintiff had proceeded only under the Harbor Workers' Act—a strikingly anomalous and unfair result.

Although for different reasons, equally subject to the charge of unfairness are the results of the *Ryan* line of cases referred to above; in each, one party must bear alone the impact of damages to which another party's actions contributed. After twenty years, this Court's deference to Congress should no longer impede its correction of the situation. This Court should now decide the question which it put aside in *Halcyon* and establish a right of contribution so that consistency and rationality may prevail in maritime personal injury actions, distributing the loss among those responsible rather than arbitrarily imposing the entire loss on one party.

We deal below with advances made since *Halcyon*, pointing towards solutions of the problems it presented.

A. *The problems facing the* Halcyon *Court: (i) whether to grant contribution, and (ii) if so, how much?*

(i) Contribution in maritime torts was the accepted practice, not only in collision cases but also in non-collision cases where particular statutory difficulties were not involved, *e.g., White Oak Transp. Co.* v. *Boston, Cape Cod and New York Canal Co.*, 258 U.S. 341 (1922). It is particularly appropriate as a characteristic of admiralty law, which recognizes the equity of the comparative-negligence rule as between plaintiffs and defendants. See Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304 (1957). In a fatal accident following (but unrelated to) a collision, the Fifth Circuit allowed contribution and restricted *Halcyon* to cases where the tortfeasor from whom contribution was sought had statutory tort immunization. *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), *cert. denied sub nom. Horton & Horton, Inc.* v. *Vaughan Marine, Inc.*, 400 U.S. 993 (1971); followed in *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970). The Second Circuit concurs. *In re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, N.Y.L.J. Oct. 8, 1971, p. 1 (2d Cir. Sept. 29, 1971). Two decisions of this Court show that Erie is not protected by the Harbor Workers' Act from its liability as a shipowner to plaintiff who was injured on its vessel. *Reed* v. *The Yaka*, 373 U.S. 410 (1963); *Jackson* v. *Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967). No reason remains why it should not contribute to the loss resulting from its substantial negligence.

(ii) Halcyon's brief in this Court (p. 10) in 1951 described three separate views in four circuits regarding the extent of liability for contribution in such cases. This

Court's decision, of course, left that question open. Since *Halcyon*, every court allowing contribution has divided the damages equally. *Horton & Horton, supra; Watz* v. *Zapata, supra; Seaboard, supra.* That was the general admiralty rule. *White Oak Transp. Co., supra; American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947). Adopting this practice would harmonize the present dichotomy between collision and non-collision cases in admiralty. It was the preference of the two dissenting Justices in *Halcyon* (342 U.S. at 287). It offers simplicity upon the trial of these third-party actions: although a comparative negligence standard may be applied as between plaintiff and the parties defendant, if there is evidence of substantial negligence on the part of each defendant the trial need not be complicated by assessing refined degrees of their fault. The damages will be borne equally by the two parties having a commercial interest in the work during which plaintiff was injured.

These indicated answers to the *Halcyon* questions being sufficiently clear, this Court should now recognize the justice of contribution in cases such as this. Such recognition would be consonant with the developing trends in the law since *Halcyon.*

2. *The* Ryan *line of cases*

Shortly after *Halcyon,* this Court found an implied warranty of workmanlike performance running from the stevedore to the shipowner, which shifted to the stevedore the impact of the uncompensated loss. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). There, the Court decided that (1) the Longshoremen's Act does not preclude assertion by a shipowner of a stevedoring

employer's liability to it, and (2) even absent an express agreement of indemnity, the stevedore's implied warranty of workmanlike service obliged it to indemnify a shipowner for damages caused by the stevedore's improper storage of cargo. In some respects, the cure was as disastrous as the disease. The responsibility for compensating the injured employee again fell entirely on the shoulders of one of the parties causing the injury—here, the one who went scot free in *Halcyon*. The decision of the Court in *Ryan* was recognized by Mr. Justice Black in his dissent as undercutting *Halcyon*. He said at 350 U.S. 124, 146:

> "There has been considerable disagreement in this Court and among other courts about three of our recent holdings, *Seas Shipping Company* v. *Sieracki*, 328 U.S. 85; *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282; and *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406. In each of these cases a worker in the same position as Palazzolo sued a shipowner alleging negligence and unseaworthiness. Judgments were obtained against the shipowners. We held in the *Halcyon* case that the shipowner could not under the common-law doctrine of 'contribution' force injured employees' employers to pay part of the judgment against the shipowner . . . The Court's opinion today provides a way under which by simple change of words and remedial formulas results reached in our three former cases can be undermined."

Under various applications, the concept of a contractual obligation to indemnify, arising out of the commercial relationship, has been enlarged and loosened. See *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958) (extended to use of equipment incidental to cargo-handling); *Crumady* v. *The Joachim Hendrik Fisser*, 358

U.S. 423 (1959) (extended to negligence which merely brought latent condition of unseaworthiness into play; and although stevedoring contract was with charterer rather than shipowner); *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) (shipowner received benefit of implied warranty, although stevedoring contract was with consignee of cargo); and *Italia Societa per Azioni de Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) (shipowner had indemnity even though stevedore was not negligent; equipment stevedore supplied was defective).

A compensating duty by the shipowner to the stevedore was found in *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1968), which discussed various other theories of liability and cross-obligations running between stevedoring contractors and shipowners. Their rights of suit *inter se* in tort and contract (other than for contribution) were left open "to place the liability where it justly belongs", 394 U.S. at 420, but without provision for the case where the liability should justly be shared. The application of an indemnity in favor of the shipowner shifted the burden once again, but it still was borne by one party only.

3. *Contribution in joint tort cases*

Contribution in non-collision cases has been allowed in three decisions during the past two years, two in the Fifth Circuit and one in the Second Circuit.[18] Each of these held that the decision in *Halcyon* that there is no right to

[18] *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (1970); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *In re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, N.Y.L.J. Oct. 8, 1971, p. 1 (2d Cir.) Sept. 29, 1971.

contribution in non-collision cases applies only where the employer's liability to his employee is by statute limited to the compensation payments thereunder.

In *Horton* the court said at page 1134:

> "Regardless of whether we consider the restrictive language of *Halcyon* as dictum or determine that it should be confined to its own particular facts, that is, as barring division of damages among joint tortfeasors, one of which is statutorily immune from tort liability, we agree with the District Court that the *Halcyon* doctrine is not applicable here. . . ."

In *Watz*, the court said at page 120:

> ". . . we have a case of joint tortfeasors. This Court has already held that the apparent prohibition of Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation, 1952, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318, against contribution between joint tortfeasors in admiralty does not apply to a situation where Watz as plaintiff could have proceeded against both Eaton and Campbell and could have recovered damages from both. Horton & Horton, Inc. v. T/S J. E. Dyer, 5 Cir. 1970, 428 F.2d 1131 [No. 28,706]. *Halcyon* is distinguished by the fact that there a statute precluded recovery by the plaintiff against the impleaded party."

In *Seaboard* the court said:

> "Here, as in Horton, had Seaboard and Moran not settled with the personal representatives of Captain Naess and Mr. Thompson, both would have been responsible in damages, unlike the situation in Halcyon, where the injured employee was restricted by the limited tort liability provisions of the Harbor Workers' Act and thus precluded from suing his employer once he had gone against the shipowner (Cf. Luigi Serra, Inc. v. S.S. Francesco C, 379 F.2d 540, 2 Cir.,

1967). We believe Halcyon to be inapplicable in cases where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute."

In this case, the joint tortfeasor against whom contribution is sought, Erie Railroad, as the shipowner is not immune from tort liability by reason of the Longshoremen's Act, on the authority of *Reed* v. *The Yaka,* 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. S.S. Co.,* 386 U.S. 731 (1967).

In *Yaka* petitioner, a longshoreman, filed a libel *in rem* against a ship for injuries sustained while engaged in loading it as an employee of the corporation which was operating it under a bareboat charter. The corporation contended that it could not be held liable in damages to petitioner for unseaworthiness, because it was petitioner's employer, and the Longshoremen's and Harbor Workers' Compensation Act provides that the compensation liability of an employer under that Act is exclusive and in place of any other liability on his part. Mr. Justice Black, on behalf of the Court, held that the petitioner was not barred by that Act from relying on the corporation's liability as a shipowner for the ship's unseaworthiness in order to support his libel *in rem* against the ship.

In *Jackson* v. *Lykes Bros. S.S. Co.* a longshoreman, employed on Lykes' ship in navigable waters, died from inhalation of noxious gases. His widow claimed that death was caused by Lykes' negligence in operating the ship or by the ship's unseaworthiness. Speaking for the Court, Mr. Justice Black held that a longshoreman employed on a ship, whether by an independent stevedoring company or by the shipowner, is not limited to his recovery under the Longshoremen's and Harbor Workers' Compensation Act but can recover *in personam* from the

owner-employer for the unseaworthiness of the ship, citing *Yaka*. The Court stated that any other result would be "incongruous, absurd and unjust" (386 U.S. at 735).

4. *Construction of the Harbor Workers' Act*

Nothing in the actual wording of the Harbor Workers' Act prohibits the contribution sought here. Section 5, 44 Stat. 1426, as set forth in 33 U.S.C. §905, reads as follows:

> "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ."

In *Weyerhaeuser S.S. Co.* v. *U. S.*, 372 U.S. 597 (1963) construing the "sister" Federal Employees' Compensation Act, 63 Stat. 861 (1949), *as amended*, 5 U.S.C. §8116(c) (1966), this Court cited the rule against giving to general words a meaning unrelated to the specific terms of the statute. Section 7(b) of that Act provided that the liability of the United States under the Act for

> "injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States. . . ."

It decided that the remedy under that Act was limited to employees, their representatives and dependents, but found no "evidence whatsoever that Congress was concerned with the rights of unrelated third parties." *Id.* at 601. Similar meaning should be given to the similar language in the

Harbor Workers' Act. As this Court noted in *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.*:

> "[T]he exclusivity of the statutory compensation remedy against the employer was designed to counterbalance the imposition of absolute liability; there is no comparable *quid pro quo* in the relationship between the employer and third persons". 394 U.S. 404 at 413 (1968).

5. *Stare decisis*

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court overruled one of its prior decisions, *The Harrisburg*, 119 U.S. 199 (1886) which had held that maritime law did not afford a cause of action for wrongful death. Considerations which led the Court to reach its decision are present in this case:

(a) There is no public policy against permitting contribution in this case. Quite the opposite. Not to permit contribution will work injustice.

(b) American jurisdictions which hold that no contribution is available under common law cite *Merryweather* v. *Nixan*, 8 T.R. 186, 101 Eng. Rep. R. 1337 (1799) as their authority. *Merryweather* involved a wilful joint wrong, and later English decisions allowed contribution among non-intentional wrongdoers. *Adamson* v. *Jarvis*, 4 Bing. 66, 130 Eng. Rep. R. 693 (1827); *Betts* v. *Gibbons*, 2 Ad. & E. 57, 111 Eng. Rep. R. 22 (1834). See Prosser, *Torts* 274-75 (3d ed. 1964).

In *Moragne*, the Court said at page 403:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish

> a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

As in *Moragne*, the first factor, the mainstay of *stare decisis* is absent. A decision permitting contribution will not threaten the confidence of people in their ability to predict the legal consequence of their actions. A division of damages between the parties at fault will assure more rather than less care. Like *The Harrisburg*, the *Halcyon* rule has failed to prove its acceptability and has been frequently either avoided or narrowly restricted. As the Court said in *Moragne* at page 405:

> "Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today."

6. *The New Jersey Joint Tortfeasors Act*

Should this Court decide that it has no right to contribution under maritime law, Atlantic in the alternative submits that a New Jersey Joint Tortfeasors Contribution Law, N.J. Rev. Stat. Chap. 2A:53A (1952) ("the Joint Tortfeasors Act"), should be applied.

Where no recognized maritime rule exists, this Court has often applied a state statute or rule rather than shape

a maritime rule on such a question. See, *e.g.*, *Hess* v. *U. S.*, 361 U.S. 314 (1960) (state employers' liability act), *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (state rule on breach of warranty in insurance contract), *Standard Dredging Corp.* v. *Murphy*, 319 U.S. 306 (1943) (state unemployment compensation law), *Just* v. *Chambers*, 312 U.S. 383 (1941) (state survival statute), *Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (1921) (state wrongful death statute).

Contrary to the court of appeals' opinion, *Halcyon* did not prevent it from applying the Joint Tortfeasors Act to allow contribution between Atlantic and Erie. Nothing in the briefs of the parties or this Court's opinion in *Halcyon* indicates that any consideration was given to the application of a state-created remedy.

State wrongful death statutes were long applied in maritime cases despite the far clearer ruling in *The Harrisburg*, 119 U.S. 199 (1886) that no such action existed under maritime law. If *The Harrisburg* did not bar the application of state statutes, then *Halcyon* should not be said to do so. Indeed, this Court cited *Halcyon* in support of its refusal to shape a maritime rule concerning the breach of an unrelated warranty in a maritime insurance policy, yet allowed the application of a state rule instead. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

In *Just* v. *Chambers*, 312 U.S. 383 (1941), respondents contended that the use of state wrongful death acts to supplement maritime law was justified because maritime law left the matter "untouched", whereas there was a "positive" maritime rule against the application of a state survival statute. This Court termed the argument

> "... a subtlety which we think does not merit judicial adoption ... [T]he pith of the matter is that the

maritime law, as we conceived it, did not permit recovery, and in the same sense, in substance, the maritime law denied the survival of causes of action against a deceased tortfeasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criterion." *Id.* at 391-92.

This Court has likened the process of deciding whether a state rule can be applied in a maritime case to the balancing attempted in "the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern." *Kossick* v. *United Fruit Co.*, 365 U.S. 731 at 739 (1961).

The use of such a "balancing test" here would compel the application of the Joint Tortfeasors Act. No federally created right would be abridged, *Wilburn Boat Co.* v. *Fireman's Ins. Co.*, 348 U.S. 310 (1955), because the application of the Joint Tortfeasors Act cannot be used to prevent a plaintiff from making a full recovery. *Tino* v. *Stout*, 49 N.J. 289, 229 A.2d 793 (1967). Maritime commerce would not be impeded in any way because the application of state-created contribution rights does not change any maritime duty of care.

New Jersey has a strong interest in applying the Joint Tortfeasors Act in the instant case. The tort took place in New Jersey territorial waters, Benazet was a resident of and worked in New Jersey, and New Jersey might well have thought it improper for Erie to escape all liability for its own negligence in failing to inspect the box car properly. As "one of the most effectual of all sanctions, . . . a liability to pay a pecuniary indemnity", *The City of Norwalk*, 55 Fed. 98, 108 (S.D.N.Y. 1893), the allowance of contribution would thus further New Jersey's interest in

protecting the safety of its residents. As the record shows, Atlantic's box car was in almost continuous transit over the lines of other railroads prior to Benazet's injury (A. 26-27). This is the norm for most railroad equipment, and it is easy to see why it is imperative to impose a high duty of care on a railroad such as Erie to inspect such rolling stock received in interchange. This is the only way in which such readily observable conditions as the rotten footboard in the instant case which develop during transit can be remedied quickly enough to avert the danger to railway men such as Benazet.

While the court of appeals indicated in *dicta* that a decision of the Appellate Division of the Superior Court of New Jersey, *Farren* v. *N. J. Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954), might prevent the application of the Joint Tortfeasors Act in the instant case, it apparently did not appreciate that the basis for the *Farren* decision was that the party from which contribution was sought was not liable to the injured person in tort. Here, Erie as the shipowner was liable to Benazet in tort as well as under the Longshoremen's Act. Furthermore, it is doubtful that *Farren* would apply in a situation such as the instant one where Erie has breached a duty of inspection owed to Atlantic under the Interchange Rules of the Association of American Railroads. See *Hagen* v. *Koerner*, 64 N.J. Super. 580, 166 A.2d 784 (App. Div. 1960); and also see *Frueh* v. *Kupper*, 54 N.J. Super. 296, 303, 148 A.2d 743, 747 (1959) (applying the state Joint Tortfeasors Act to a maritime accident): "... the basic purpose of the statute is to achieve a sharing of the common responsibility according to equity and natural justice."

CONCLUSION

The decision of the Court of Appeals refusing to award contribution should be reversed.

Respectfully submitted,

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